Standard Chartered Bank v Mukah Singh

HIGH COURT (KOTA KINABALU) — SUIT NO K93 OF 1992
IAN HC CHIN J
23 MARCH 1996

Contract *— Breach — Housing loan secured by a charge on the property — Failure to repay loan instalments — Property sold by private treaty — Proceeds of sale insufficient to pay debt owing — Claim for balance and interest*

Land Law *— Charge — Satisfaction of charge issued with proviso 'without prejudice to our rights to claim the balance of the chargor's outstanding account due to us' — Whether loan was fully discharged — Whether plaintiffs' statement of claim disclosed a cause of action*

Land Law *— Charge — Payment of redemption sum — Whether as a matter of law discharged the whole debt — Whether there was agreement to the same effect*

Evidence *— Documentary evidence — Computer printout — Admissibility — Unchallenged evidence that documents were computer-generated and produced in the course of ordinary use of the computer — Whether necessary to produce a certificate — Evidence Act 1950 s 90A(2)*

This was a a claim for RM168,575.43 by the plaintiffs against the defendant being the balance and interest due on a housing loan of RM300,000 which was secured by a charge on the property that was later sold by private treaty for RM220,000 after the defendant had failed to repay the loan instalments. The plaintiffs executed the satisfaction of charge after receiving the proceeds of sale wherein the plaintiffs inserted a proviso: 'without prejudice to our rights to claim the balance of the chargor's outstanding account due to us'. The defendant averred that the private treaty sale resulted in the redemption of the charge and the purchase price of RM220,000 was duly paid in full and final settlement of the redemption sum. It is submitted that the plaintiffs' claim is based on a memorandum of charge annexed with the loan agreement and since the memorandum of charge was satisfied, it was argued that the plaintiffs' claim disclosed no cause of action. The issues before the court were, inter alia: (i) whether the plaintiffs' cause of action was based on the memorandum of charge; (ii) whether the satisfaction of charge issued by the plaintiffs had the effect of fully satisfying the loan agreement; (iii) whether as a matter of law, the payment of a redemption sum discharged the whole debt; and (iv) whether as a matter of fact, there was an agreement that the payment of the redemption sum discharged the whole debt.

Held, allowing the plaintiffs' claim:

(1) The statement of claim referred in unequivocal terms to a housing loan being granted and to a balance due thereunder. Though mention was made of the memorandum of charge and the loan agreement, it was made more for the purpose of explaining how

A the property was sold which thus gave the balance owing under the housing loan than anything else. The action is simply one for a debt owing by the defendant to the plaintiffs under a housing loan (see p 247F–G).

(2) Learned counsel had not mentioned the proviso that was inserted B in the satisfaction of charge. This omission fatally flawed his argument as his argument proceeded on the assumption that there was an unqualified satisfaction of the charge when in fact it was not so. Therefore, on that document alone, that is the satisfaction of charge, it could not be said that the debt or the loan agreement was fully discharged since there was an express C proviso that the outstanding amount was still due. That alone should be sufficient to dispose of the argument that the statement of claim disclosed no cause of action (see pp 249B–C and 251C).

(3) There is no statutory provision to regulate what happens when the proceeds of sale are insufficient to pay the debt owing though D r 14(17) of the Sabah Land Rules 1930 provides for surplus to be given back to the chargor. Therefore, nothing turns on the statutory provisions and there is no statute to say that the payment of a redemption sum discharges whatever is owing (see p 250C–D).

E (4) To determine whether the parties have, by the use of the words 'redemption sum', agreed that the payment of such a redemption sum discharged whatever amount was owing by the defendant to the plaintiffs, the court would have to take into account the circumstances and the matrix of facts leading to the use of the F words 'redemption sum'. It was not argued that there was an agreement between the parties that the payment of the 'redemption sum' was a full discharge of the debt and the use of the words 'redemption sum' was the result of such agreement. Consequently, there was no evidence to establish that agreement. (see pp 250F and 251A–E); *Chooi Siew Cheong v Lucky Height* G *Development Sdn Bhd & Anor* [1995] 1 AMR 17:929 and *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 followed.

(5) A charge and the debt for which the charge was executed are two separate things. The satisfaction of a charge does not necessarily H mean the satisfaction of the whole debt whereas the converse is the case (see p 252C–D).

(6) It was only if the evidence was challenged as to its admissibility that it was necessary to produce a certificate under s 90A(2) of the Evidence Act 1950, that the documents were produced by a I computer in the course of its ordinary use. Since the documents were unchallenged, such a certificate was unnecessary (see pp 255I and 256A–B); *Credit Corp (Malaysia) Bhd v Sykt Poh Kim Seng (M) Sdn Bhd & Ors (and other suits)* (Suit K 379 of 1988, High Court, Kota Kinabalu, 2 March 1996) (unreported) followed.

(7) The defendant had failed to argue that the amount claimed by the plaintiffs was incorrect prior to his testimony in court and then in court, he contradicted himself and produced no document as support. The evidence from the plaintiffs would be taken as the amount owed by the defendant (see pp 257B–I and 258A).

[Bahasa Malaysia summary

Ini merupakan suatu tuntutan untuk sejumlah RM168,575.43 oleh plaintif terhadap defendan sebagai baki dan faedah yang harus dibayar atas suatu pinjaman perumahan sebanyak RM300,000 yang dijamin oleh suatu gadaian di atas harta tersebut, yang mana ianya kemudian dijual menerusi triti persendirian untuk sejumlah RM220,000 setelah defendan gagal membayar balik ansuran pinjaman. Plaintif menyempurnakan penyelesaian gadaian selepas menerima hasil jualan dalam mana plaintif telah memasukkan suatu proviso: 'tanpa menjejaskan hak kami untuk menuntut baki akaun penggadai yang belum dijelaskan yang harus dibayar kepada kami'. Isu-isu yang perlu dipertimbangkan oleh mahkamah adalah, antara lain: (i) sama ada atau tidak kausa tindakan plaintif berasaskan memorandum gadaian; (ii) sama ada atau tidak penyelesaian gadaian yang dikeluarkan oleh plaintif mempunyai kesan memenuhi perjanjian pinjaman tersebut; (iii) sama ada atau tidak dari segi undang-undang, bayaran jumlah penebusan melepaskan keseluruhan hutang; dan (iv) sama ada atau tidak dari segi fakta, terdapatnya suatu perjanjian bahawa bayaran jumlah penebusan melepaskan keseluruhan hutang.

Diputuskan, membenarkan tuntutan plaintif:

(1) Pernyataan tuntutan tanpa sebarang kesangsian merujuk kepada pemberian suatu pinjaman perumahan dan kepada baki yang harus dibayar di bawahnya. Walaupun ada tersebut memorandum gadaian dan perjanjian pinjaman, ianya dibuat dengan tujuan menjelaskan bagaimana harta tersebut dijual yang memberikan baki yang terhutang di bawah pinjaman perumahan. Tindakan ini semata-mata merupakan suatu tindakan untuk hutang yang belum dijelaskan oleh defendan kepada plaintif di bawah satu pinjaman perumahan (lihat ms 247F–G).

(2) Peguam tidak menyebut proviso yang dimasukkan dalam penyelesaian gadaian. Peninggalan ini memberikan kecacatan kepada hujah beliau oleh kerana hujahnya diteruskan atas anggapan bahawa terdapatnya suatu penyelesaian gadaian yang tidak bersyarat apabila pada hakikatnya ia bukanlah demikian. Oleh itu, atas dokumen itu sendiri, yakni penyelesaian gadaian, ia tidak boleh dikatakan bahawa hutang atau perjanjian pinjaman telah dilepaskan sepenuhnya oleh kerana terdapatnya proviso nyata bahawa amaun yang belum dijelaskan masih harus dibayar. Ini sendiri harus mencukupi untuk memusnahkan hujah bahawa pernyataan tuntutan tidak mendedahkan sebarang kausa tindakan (lihat ms 249B–C dan 251C).

(3) Tiada terdapatnya peruntukan statutori untuk mengawal apa yang berlaku apabila hasil jualan tidak mencukupi bagi membayar jumlah yang terhutang walaupun k 14(17) Kaedah-Kaedah Tanah Sabah memperuntukkan bahawa lebihan harus dikembalikan kepada penggadai. Oleh yang demikian, tiada apa-apa yang terdapat dalam peruntukan statutori dan tiadanya statut yang mengatakan bahawa bayaran jumlah penebusan melepaskan apa yang terhutang (lihat ms 250C–D).

(4) Bagi menentukan sama ada atau tidak pihak-pihak telah bersetuju bahawa bayaran jumlah penebusan sedemikian melepaskan apa saja amaun yang dihutang oleh defendan kepada plaintif menerusi penggunaan perkataan-perkataan 'jumlah penebusan', mahkamah harus mengambil kira keadaan-keadaan dan matriks fakta yang membawa kepada penggunaan perkataan-perkataan 'jumlah penebusan'. Ianya tidak dihujahkan bahawa terdapatnya suatu perjanjian antara pihak-pihak bahawa bayaran 'jumlah penebusan' merupakan pelepasan penuh hutang itu dan penggunaan perkataan-perkataan 'jumlah penebusan' adalah akibat perjanjian itu. Dengan itu, tiada bukti bagi menunjukkan perjanjian itu wujud (lihat ms 250F dan 251A–E); *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 AMR 17:929 dan *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 diikut.

(5) Sesuatu gadaian dan hutang atas mana gadaian disempurnakan adalah dua hal yang berasingan. Penyelesaian gadaian tidak semestinya bermakna penyelesaian keseluruhan hutang tetapi kes sebaliknya adalah benar (lihat ms 252C–D).

(6) Hanya apabila keterangan dicabar atas kebolehterimaan barulah ianya perlu dikemukakan suatu perakuan di bawah s 90A(2) Akta Keterangan 1950, iaitu bahawa dokumen-dokumen tersebut dikeluarkan oleh komputer dalam perjalanan penggunaannya yang biasa. Oleh kerana dokumen-dokumen tersebut tidak dicabar, perakuan sedemikian tidak perlu (lihat ms 255I dan 256A–B); *Credit Corp (Malaysia) Bhd v Sykt Poh Kim Seng (M) Sdn Bhd & Ors (and other suits)* (Suit K 379 of 1988, High Court, Kota Kinabalu, 2 Mac 1996) (tidak dilaporkan) diikut.

(7) Defendan telah gagal menghujah bahawa amaun yang dituntut oleh plaintif adalah tidak betul sebelum testimoninya di mahkamah, dan kemudiannya di mahkamah defendan telah menyangkal kenyataan sendiri dan tidak mengemukakan dokumen sebagai sokongan. Keterangan plaintif akan diterima sebagai jumlah yang dihutang oleh defendan (lihat ms 257B–I and 258A).]

Notes

For cases on breach, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1185–1242.

For cases on charge, see 8 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1408–1564.

For cases on documentary evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 688–789.

Cases referred to

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 AMR 17:929

Credit Corp (Malaysia) Bhd v Sykt Poh Kim Seng (M) Sdn Bhd & Ors (and other suits) (Suit K 379 of 1988, High Court, Kota Kinabalu, 2 March 1996) (unreported)

Malayan United Finance Bhd v Tay Lay Soon [1991] 1 MLJ 504

Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 2 CLJ 23

MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642

Legislation referred to

Evidence Act 1950 s 90A(2)

Land Ordinance (Sabah Cap 68) ss 4, 104, 109

Sabah Land Rules 1930 r 14(17)

Wong Suk Anne & Kartina Sulong (*Skinner Lind Willie Wong & Chin*) for the plaintiffs.

Sugumar Balakrishnan (*Sugumar & Co*) for the defendant.

Cur Adv Vult

Ian HC Chin J: This is a claim for RM168,575.43 by Standard Chartered Bank ('the plaintiffs') against Mukah Singh ('the defendant'), being the balance and interest due on a housing loan of RM300,000 which was secured by a charge on the house ('the property') that was later sold by private treaty on 19 July 1991 for RM220,000 after the defendant had failed to repay the loan instalments. The defence is in the following terms:

1 Paragraphs 1, 2, 3, 4 and 5 of the statement of claim are admitted.

2 Paragraphs 6 and 7 of the statement of claim are denied and the defendant will aver that the redemption sum of the charge created in favour of the plaintiffs by the defendant over Town Lease No 207512703 was RM220,000 and this fact is expressly admitted in the plaintiffs' solicitors' letter dated 19 July 1991.

3 The defendant ... with the consent of the plaintiffs, sold Town Lease No 207512703 by private treaty to Sulong bin Junaidi and Nafsol bte Mohd Noor for the sum of RM220,000 pursuant to a sale and purchase agreement dated 19 July 1991.

4 The defendant ... aver that the purchase price of RM220,000 was duly paid ... in full and final settlement of the redemption sum.

5 The defendant ... aver that after settlement of the redemption sum, no further payment is due from the defendant to the plaintiffs in respect of the housing loan as such the plaintiffs' claim discloses no cause of action and is frivolous and vexatious.

6 Paragraph 8 of the statement of claim is denied and the defendant will aver that in law and in fact he is not liable to pay the said sum of RM168,575.43 or any part thereof since he has fully settled the redemption sum.

7 Save as hereinbefore expressly admitted or pleaded thereto the defendant specifically deny each and every allegation contained in the statement of claim as if the same were specifically set forth herein and traversed seratim.

Facts of Case

The dispute should, as a result of the pleadings, centre around the circumstances leading to the letter from the plaintiffs' advocate to the defendant dated 19 July 1991 ('the letter'), around the letter itself and also around the satisfaction of charge dated 13 February 1992, but the circumstances leading to the letter — though elicited in evidence — were not referred to in the closing speeches. The letter is in the following terms:

SKINNER, LIND ROBERTSON, WILLIE, WONG & CHIN
[Etc ...]

19 July 1991
Mr Mukah Singh
Labuan FT

Sir
Re Glamour
TL 207512703
Redemption sum
RM220,000

We act for Standard Chartered Bank, Kota Kinabalu in respect of the above matter.

We have been instructed by our clients to inform you that they are prepared to adjourn the auction for the above property which is scheduled on 5 August 1991 on the following conditions:

(a) a sale and purchase agreement is executed between you and the purchaser for the sum of RM220,000 which is to be paid directly to us as solicitors for onward transmission to our clients.

(b) upon execution of the sale and purchase agreement a deposit of RM220,000 shall be paid to us, which sum shall be forfeited if the balance of the purchase price is not paid within 10 days from the date of the agreement.

If the above terms are acceptable to you kindly sign your acceptance on the duplicate of this letter.

Yours faithfully

—Sgd—

I, Mukah Singh, have read and understand the above terms to which I agree and accept the same.

—Sgd—

Mukah Singh
Dated this 19 July 1991.

The satisfaction of charge is in a form prescribed by s 109 of the Land Ordinance and contains a declaration: 'we have received full and complete satisfaction of the charge on the land ... '. However, the prescribed version was, in the present case, amended by the plaintiffs by the insertion of the words: '*Without prejudice to our rights to claim the balance of the chargor's outstanding account due to us*' which variation is, by the fact of its registration, permitted by the registrar of titles under s 104 of the Land Ordinance. The satisfaction of charge was executed by the plaintiffs after they had received the sum of RM220,000 being the proceeds of the sale of the property which was the subject matter of the charge.

As for the oral evidence for the plaintiffs, they came mainly from Ricky Soong while the documents produced speak for themselves. The loan of RM300,000 was drawndown after the execution on 26 December 1981 of the memorandum of charge and the loan agreement annexed to it. The loan was to be repaid with interest by monthly instalments of RM3,670.80. It is a term — cl 13 — of the loan agreement that so long as any money is unpaid and even though the bank had exercised its power of sale in accordance with the Land Ordinance, the defendant shall not be relieved of his liability to pay interest on any balance remaining unpaid after such sale. I will now proceed to set out the arguments of both learned counsel — Ms Wong Suk Anne for the plaintiffs and Mr Sugumar Balakrishnan for the defendant — and also set out more of the facts that are relevant to the issues being argued.

Contentions

It was against the backdrop which I have just set out that Mr Sugumar commenced his closing speech in the following manner:

A *What is the plaintiffs' alleged cause of action based on*

1 It is based on P2 (memorandum of charge) as can be seen from the plaintiffs' statement of claim.

2 P2 is dated 26 December 1981 but was registered on 11 May 1982. Clause 1 of the loan agreement annexed to P2 expressly states that the proceeds of the loan shall be released only after P2 has been registered, ie after 11 May 1982.

A 3 Clause 2(1) of the loan agreement provides for the defendant to repay the loan by monthly instalments of RM3,670.80 with effect from the month next following the month in which the loan sum was released.

I am in agreement with Ms Wong that the plaintiffs' cause of action is not based on the memorandum of charge. Since the statement of claim speaks B for itself, it is best I reproduce the relevant part, viz:

3 By a letter of offer dated 10 July 1981 (hereinafter referred to as 'the said letter'), the defendant was granted a housing loan for the sum of RM300,000 (hereinafter referred to as 'the said housing loan'). The said housing loan is secured by a memorandum of charge together with annexure annexed thereto against Town Lease No 207512703 C (hereinafter called 'the said property') and dated 26 December 1981 for the sum of RM300,000 only.

4 In breach of the terms of the said letter and the said memorandum of charge and annexure, the defendant defaulted in the repayment of the monthly instalments.

D 5 The said property was sold off by a private sales agreement dated 19 July 1991 (hereinafter referred to as 'the sale and purchase agreement') for a price of RM220,000.

6 The defendant has wrongfully failed to pay the balance of the said housing loan (exclusive of sales proceeds) amounting to the sum of RM168,575.43 inclusive of interest as at 27 December 1991 and the E same remains due and owing.

7 By reason of the matter alleged herein, the plaintiffs had sustained a loss of RM168,575.43 including interest up to 27 December 1991.

Clearly, the statement of claim refers in unequivocal terms to a housing loan being granted by the letter and to a balance due thereunder. Though F mention is made of the memorandum of charge and the loan agreement, it was made more for the purpose of explaining how the property was sold which thus gave the balance owing under the housing loan than anything else. In any event, it does not convert the cause of action from one of suing for a debt to something else. I am therefore unable to agree that the cause G of action was based on the memorandum of charge. The action is simply one for a debt owing by the defendant to the plaintiffs under a housing loan. It was after this that learned counsel, Mr Sugumar, submitted that there was no cause of action, viz:

B *The plaintiffs' statement of claim discloses no cause of action against the* H *defendant*

4 At the date of filing of this action, ie on 23 May 1992 the plaintiffs had already issued a satisfaction of charge (P6) declaring ' ... we have received full and complete satisfaction of the charge on the land described in Title No 207512703 ... '. Therefore, no cause of action can be founded on P2 which has been fully satisfied.

I 5 PW1 and PW2's contention that P5 only related to the redemption sum of the title is without legal basis. The Supreme Court in *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504 makes it clear that a charge does not involve transfer of the title to the land as such

there is no redemption of the title as in the case of a common law mortgage. A

6 In *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642, the Supreme Court clearly indicated that there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty and once this is done it is incumbent on the chargee to discharge the charge to give full effect to the sale. B

7 The plaintiffs had an available remedy under the charge, namely, to foreclose but they chose not to do so and had instead consented to a private treaty sale. It is submitted that the plaintiffs in granting the consent is deemed to have been satisfied that the charge will be redeemed or discharged. Having elected to waive their foreclosure rights and having consented to a private treaty sale which resulted in the redemption of the charge, the plaintiffs now cannot seek to exercise their rights under the charge which has been redeemed and discharged. C

8 What then is the position of the loan agreement upon the redemption or discharge of the memorandum of charge. As clearly indicated in cl 16 of the loan agreement the memorandum of charge is the principal instrument employed in the loan transaction. Therefore, it is submitted that once the charge is redeemed or discharged the loan agreement, which is a secondary instrument, cannot subsist or stand on its own to provide the plaintiffs with a cause of action. It is submitted that the loan agreement, which is part and parcel of the charge, is no longer operative or effective once the charge had been redeemed or discharged. D E

What are the issues raised by the pleadings is the question which must be answered first — because there is disagreement in that area — before the submission of learned counsel falls to be considered. As I have already said, the statement of claim asserted a housing loan being given to the defendant and to a balance being due thereunder (paras 3 and 6), which is a claim for a debt due. In answer to the claim, the defendant in paras 2, 3 and 4 adverted to the plaintiffs' agreement to a redemption sum of RM220,000 and to a sale by private treaty of the property for a sum of RM220,000, the proceeds of which was paid 'in full and final settlement of the redemption sum'. Paragraphs 5 and 6 of the defence are in the following terms, which for ease of reference are again reproduced, viz: F G

5 The defendant ... aver that after settlement of the redemption sum, no further payment is due from the defendant to the plaintiffs in respect of the housing loan.

6 Paragraph 8 of the statement of claim is denied and the defendant will aver that in law and in fact he is not liable to pay the said sum of RM168,575.43 or any part thereof since he has fully settled the redemption sum. H

By the terms of paras 5 and 6 of the defence, read with the preceding paras 2, 3 and 4, it can be argued that the defence raises the issue of: (i) whether *as a matter of law* the payment of a redemption sum discharged the debt, that is, whatever amount owing under the housing loan; and (ii) whether *as a matter of fact* there was an agreement that the payment of the redemption sum discharged the debt. It was against this state of the pleadings that Mr Sugumar contended the statement of claim, according to learned counsel, I

A discloses no cause of action because on the day — which was 23 May 1992 — the writ was taken out, 'the plaintiffs had already issued a satisfaction of charge (P6) declaring ' ... *we have received full and complete satisfaction of the charge on the land described in Title No 207512703* ...' and that, therefore, no cause of action can be founded on the loan agreement which has been fully satisfied. The immediate comment that this submission should draw B is that learned counsel had not correctly recited the satisfaction of charge. Learned counsel had not mentioned the proviso that was inserted in the satisfaction of charge which proviso I had mentioned earlier. This omission fatally flaws his argument as his argument proceeded on the assumption that there was an unqualified satisfaction of the charge when in fact it was C not so. That alone should be sufficient to dispose of the argument of Mr Sugumar that the statement of claim discloses no cause of action. Learned counsel had referred to *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504 (SC) as supporting his contention. That case dealt with a charge under the National Land Code 1965 and the (then) Supreme Court there held that since the right or interests in the charged land D remained with the registered owner, he had nothing to redeem, and that to speak of the equity of redemption under the National Land Code 1965 was clearly technically and legally incorrect. The fact of that case was that some five years after the charge was registered, a third party claimed to have bought the land and registered caveats against the land. The chargee E applied to remove the caveats claiming their interest to rank in priority to that of the third party. The third party riposted and said they were entitled to redeem the said land but that the chargee had refused to let them know the amount due. The registered land owner had earlier unsuccessfully applied under the National Land Code 1965 to remove the caveats. It was against this backdrop that the Supreme Court, at pp 507–508, had this to F say:

> Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it renders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s 243) ... . Since the right or G interests in the charge land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it in our situation under the Land Code is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical.

H Therefore, what that case decides is that there is no such thing as the equity of redemption known to the land law of Malaya. I am of the view that the same can be said of the land law of Sabah where the Land Ordinance (Sabah Cap 68) ('the Land Ordinance') applies. Another case relied on by Mr Sugumar is *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 (SC), which is a case where a bank, I at the same time they had agreed to a sale by private treaty, yet proceeded to an auction sale which auction sale was later set aside by the learned judge who had made the order for the auction sale. The Supreme Court there held the learned judge was *functus officio* and had no power to set aside the order for auction sale. The facts and issues that pertain to those

cases are entirely different from the present case. The issue in our case is whether the satisfaction of charge issued by the plaintiff had the effect of, to use the words of learned counsel, fully satisfying the loan agreement — meaning, I assume, that the liability of the defendant to pay the full sum due under the loan agreement had been relieved by the payment of the redemption sum. This surely would depend on what the parties had agreed unless there are statutory provisions governing such situation. As for the statute, land matters in Sabah are governed principally by the Land Ordinance and s 109 of the Land Ordinance provides for a memorandum of satisfaction to be executed when any charge has been satisfied, the form of which I have already earlier referred to. Another relevant legislation is the Sabah Land Rules 1930 where r 14(17) makes provision for the distribution of the proceeds of an auction sale. There is no statutory provision to regulate what happens when the proceeds of sale are insufficient to pay the debt owing though the said r 14(17) provides for surplus to be given back to the chargor. Therefore, nothing turns on the statutory provisions and there is no statute to say that the payment of a redemption sum discharges whatever is owing. If Mr Sugumar is arguing as a matter of statutory law that the redemption sum ipso facto discharges the debt owed and since there is no statute to support such a contention and since the two cases cited by him also do not support such a contention, his argument fails. Since, according to *Malayan United Finance Bhd v Tay Lay Soon*, there is nothing to redeem because the right or interest to the land remains with the defendant, what then did the parties mean by the use of the words 'redemption sum'? This question, I would have thought — following the issues raised by the pleading — should be the next consideration which in turn would beg the question whether the parties have, by the use of the words 'redemption sum', agreed that the payment of such a redemption sum discharges whatever amount was owing by the defendant to the plaintiffs, that is, the payment of the lesser sum of RM220,000 was agreed to be in satisfaction of a larger sum due. For this purpose, what the parties had agreed or intended would necessarily mean taking into account the circumstances and the matrix of facts leading to the use of the words 'redemption sum' in the letter dated 19 July 1991 (*Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 AMR 17:929 (FC), [1995] 2 CLJ 11; *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 (FC) at p 31F). As for the facts, cl 13 of the loan agreement provides for the deficiency to be paid by the chargor in the event of a sale under the Land Ordinance and the rules made thereunder. A similar provision was not made in the event of a sale by private treaty. This means the question of a deficiency in the event of a private treaty sale was not covered by the loan agreement. Therefore, whatever is urged as being the position of the parties immediately before and following the payment of the redemption sum must be the result of an agreement by the parties or the position must be covered by statute. Since I have already concluded that there is no such statutory provision, it means any contention that the payment of RM220,000 was sufficient to discharge the debt owing by the defendant must be based on an agreement arrived at by the parties or that it is so under the common law. Since it was not argued that under the

common law, the payment of a smaller sum — which is termed in this case as the redemption sum — can discharge a larger debt, I will not concern myself with it. Mr Sugumar appears to rely solely on the satisfaction of charge executed by the plaintiff as showing the debt to have been fully satisfied, which I would agree with him would be the case if the satisfaction of charge was worded in the way he had submitted. But, as I have mentioned earlier, the satisfaction of charge was not so worded but was qualified with the words: 'Without prejudice to our rights to claim the balance of the chargor's outstanding account due to us' and this satisfaction of charge was dated 13 February 1992, before the writ was issued on 23 May 1992. Therefore, on that document alone, that is the satisfaction of charge, it cannot be said that the debt or the loan agreement was fully discharged since there is an express proviso that the outstanding was still due. Mr Sugumar did not argue that there was an agreement between the plaintiffs and the defendant that the payment of the 'redemption sum' was a full discharge of whatever was owing and the use of the words 'redemption sum' was the result of such agreement. Consequently, he did not point to any evidence as establishing that agreement. I therefore need not consider whether the words 'redemption sum' and whether the subsequent payment of that sum was a result of an agreement made by the parties and whether it had the effect or not of relieving the defendant from paying whatever debt still owing after the sale of the property. In any event, the evidence does not support such an agreement.

What then of this submission of learned counsel: 'Having elected to waive their foreclosure rights and having consented to a private treaty sale which resulted in the redemption of the charge, the plaintiffs now cannot seek to exercise their rights under the charge which has been redeemed and discharged.' The short answer to that argument is that the plaintiffs are seeking to recover a debt, and not seeking to exercise their rights under the charge. Mr Sugumar had earlier on submitted that the plaintiffs' claim is based on a memorandum of charge annexed with the loan agreement and learned counsel had submitted that since the memorandum of charge was satisfied, no cause of action can be founded on the memorandum of charge. Learned counsel did not elaborate on his submission. I am of the view that it is necessary to ascertain what a memorandum of charge is and what purpose it serves before determining the effect of its satisfaction by the execution of a satisfaction of charge. Section 4 of the Land Ordinance has supplied the definition for 'charge' and it is in the following terms, viz:

> 'charge' means any charge created on land for the purpose of securing the repayment of money, and also the instrument by which the charge is created.

Where land is to be charged the form prescribed by s 104 of the Land Ordinance — with such variations as the registrar of title may permit — must be used. The form contains recital as to the amount of the loan, the terms of repayment and the interest chargeable. It also contains the provision for sale in accordance with the Land Ordinance in the event of a default in repayment of the loan. It also has the following provision:

> And for the better securing the repayment of the said principal sum and interest I/we hereby charge the land above described with such principal sum and interest.

Clearly, from the statutory definition and the prescribed form, the charge or the memorandum of charge is a form of security for the repayment of the loan. Therefore, when a charge is satisfied it means the land or property has been released from the security. This means that when a charge is satisfied, it could be either because the full amount of the debt has been paid or that a part of the amount has been paid but the chargee is nevertheless satisfied with receiving that amount, not in satisfaction of the debt but in satisfaction of the charge; that is to say, to release the title from the encumbrance of the charge to allow a dealing. like a transfer or another charge, with the title. Therefore, a charge (or memorandum of charge) and the debt for which the charge (or memorandum of charge) was executed are two separate things. The satisfaction of a charge does not necessarily mean the satisfaction of the debt whereas the converse is the case. When the plaintiffs sue for the balance due after the charge has been satisfied, he is not suing under the charge but suing for a debt which arose out of the housing loan granted by the plaintiffs to the defendant.

It was also submitted by Mr Sugumar that once the charge is redeemed or discharged the loan agreement, which is a secondary instrument, 'cannot subsist' or stand on its own to provide the plaintiffs with a cause of action and that the loan agreement is 'no longer operative or effective' and learned counsel referred to cl 16 of the loan agreement which is in the following terms:

> 16 This agreement and the memorandum of charge referred to in cl 14 hereof are instruments employed in the same transaction and for the purpose of s 4(3) of the Stamp Ordinance (Cap 137), the memorandum of charge shall be the principal instrument.

With all due respect to learned counsel, I am of the view that he is labouring under the misconception that the charge and the debt are one and the same thing with the result that when the charge is satisfied, the debt is also satisfied. As I have earlier pointed out, they are two separate things, the charge being an instrument to secure the payment of the debt while the satisfaction of the charge does not necessarily mean the satisfaction of the debt. I agree with Ms Wong, learned counsel, that cl 16 has absolutely no bearing on the issue and that clause is merely for the purpose of avoiding payment of stamp duties twice over in respect of the loan and for that reason, one document was designated the principal instrument where the full stamp duties were payable.

It was finally submitted by Mr Sugumar that the plaintiffs have failed to prove their claim for RM168,575.43 and his submissions are in the following terms:

> C *The plaintiffs have failed to prove their claim for judgment in the sum of RM168,575.43*
>
> 9 It is trite law that the burden of proof rests upon the party who desires any court to give judgment as to any legal right or liability on the

existence of facts which he asserts: see ss 101 and 102 of the Evidence Act 1950; *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145; *Lim Soh Meng & Anor v Krishnan* [1967] 1 MLJ 8; *Chow Kay Kong v Ching Tong & Ors* [1967] 2 MLJ 31; *Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 and *Johara Bi bte Abdul Kadir Marican v Lam Kwok Fou, Lawrence & Anor* [1981] I MLJ 139.

10 What evidence has been adduced to prove that the sum of RM168,575.43 is due and payable? The plaintiffs are relying on P21 and P22. Both these documents are inadmissible by reason of non-compliance with the relevant statutory provision, namely s 90A of the Evidence Act 1950. Section 90A(1) provides for admissibility of documents produced by computers if the documents were produced by computers in the course of its ordinary use. Section 90A (2), (3) and (4) provides for the mode of proving that a document was produced by a computer in the course of its ordinary use. However, the plaintiffs have failed to tender the requisite certificate as such they have failed to comply with the strict provisions of s 90A. Therefore, P21 and P22 are admissible.

11 What is the position if no objection is raised to the admissibility of P21 and P22? Submit that irrespective of whether there has been a failure to object, it is the duty of the court to disallow all inadmissible evidence. It is further submitted that the omission to object to the admission of a document which was inadmissible did not and could not make it admissible: *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124; *Sykt Jengka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201.

12 All we are left with are bare assertions as in P24, P15 and P16. No evidence was led as to how the sum of RM168,575.43 became due and payable. The plaintiffs made no attempt to tender in evidence the document referred to in bundle B as item 8 which could have shown how the figure of RM168,575.43 was arrived at.

13 PW3 in her evidence said that the sum due and payable was RM168,575.43 but this was based on P22, which is inadmissible evidence for the reasons stated earlier, and on item 8 of bundle B which was never tendered in evidence.

14 However, the defence has adduced uncontroverted evidence to show that the sum of RM168,575.43 which is alleged to be due and payable was incorrect for the following reasons:

(a) The defendant in his evidence stated that he had made some 50 instalment payments of RM3,670.80 each (the monthly repayment of RM3,670.80 is expressly indicated in cl 2(1) of the loan agreement. The defendant says that he made a total repayment of RM183,000 plus. The actual total repayment would be RM183,540. Learned counsel for the plaintiffs did not at any time during cross-examination put to the defendant that his aforesaid evidence was not true. Submit that her failure in this respect should be treated as an abandonment of the plaintiffs' contention that the defendant had only made repayments totalling RM66,430.79 as stated in item 8 of bundle B: see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770.

(b) The plaintiffs have not adduced any primary evidence to show that a sum of RM168,575.43 was due. P21 and P22, without the aid of the presumption under s 90A of the Evidence Act 1950, are inadmissible for this reason as well: see *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627.

(c) The defendant's contention that the housing loan proceeds were released after registration of the charge is confirmed by cl 1 of the loan agreement. The defendant further says that the loan was released sometime in May 1982 and he commenced repayment from July 1982 is confirmed by cl 2 (1) of the loan agreement. The defendant's evidence that from July 1982 right up to August 1986 he had regularly paid the monthly instalments is corroborated by P3 which states that as 30 December 1986 he had defaulted in paying four monthly instalments, which means from September to December 1986 there were no instalments due and payable. A calculation of monthly instalments from July 1982 to August 1986 would total approximately 50 monthly instalments of RM3,670.80 each totalling RM183,540.

(d) Item 8 relating to repayments receipts from 6 August 1981 and interest accrued from July 1981 could not be true since the loan proceeds were only released after registration of the charge on 11 May 1982. Clause 1 of the loan agreement expressly states that the loan proceeds shall only be released after registration of the charge.

(e) Based on two uncontroverted facts, namely, the defendant had made repayments totalling RM183,540 and the plaintiffs had received the sale proceeds of RM220,000 would mean the plaintiffs had received repayments totalling RM403,540 against a loan drawdown of RM300,000. In item 8 of bundle B accrued interest is stated as RM151,661.22 (which has been calculated incorrectly from July 1981 when the loan proceeds had not been released yet) plus RM3,345 as miscellaneous bank charges. The defendant contends that the interest accrued figure shown therein is incorrect but for argument's sake we accept the figure of RM151,661.22 (which is denied) plus the aforesaid RM3,345; the defendant's alleged balance of the debt (which is denied) would be:

Total repayments	RM183,540.00	
Sale proceeds	RM220,000.00	
	RM403,540.00	
Loan drawdown	RM300,000.00	
Interest accrued (denied)	RM151,661.22	
Misc bank charges	RM 3,345.00	
	RM455,006.22	
Debit balance (denied)		RM51,466.22

> In the premises, it is submitted that the plaintiffs have failed to prove: (a) that the defendant is liable under the charge; and (b) that the plaintiffs are entitled to judgment in the sum of RM168,575.43 against the defendant and therefore the plaintiffs' action ought to be dismissed with costs.

The documents that are disputed and referred to as P21 and P22 in the submission are respectively the computer-generated loan ledger cards of 30 June 1991 and 31 December 1991, and these documents show the amount owing by the defendant to the plaintiffs at monthly intervals from 25 January 1991 to 25 December 1991. Mr Sugumar submitted that those documents were inadmissible and should not have been admitted because s 90A(2) of the Evidence Act 1950, requiring a certificate from the person responsible for the computer, was not complied with. First, to the question of the admission of the documents. This is what happened at the trial when Ricky Soong was testifying for the plaintiffs, viz:

> At that time the account owing by defendant to bank was more than RM220,000: bundle B pp 16 and 17. These are copies of the loan ledger card. They are computer prints. Original copy sent to the defendant.
>
> Wong: Tender ledger card print out as evidence.
>
> Sugumar: Loan ledger card was never sent to the defendant. If want to tender loan ledger card, by all means.
>
> Court: Admit as P21 and P22.
>
> These cards are generated by a computer centre in Kuala Lumpur and produced every six months. They are sent out to the defendant every six months. I did not send them out myself. They were sent by the Labuan branch. I do not know who in the Labuan branch sent them. Our office regulation requires them to be sent. Printout from information inputted daily into computer.

The admission of the documents, as can be gathered from the notes of proceedings, was never objected to and the reservation expressed was that the defendant did not receive the documents. Not having objected to their admission, Mr Sugumar now turns round to say that the court should have rejected them even though he did not object to their admission. What then is the legal position arising from such a situation? I had the occasion to deal with a somewhat similar stance as that adopted by Mr Sugumar in the unreported case of *Credit Corp (Malaysia) Bhd v Sykt Poh Kim Seng (M) Sdn Bhd & Ors (and other suits)* (Suit K 379 of 1988, High Court, Kota Kinabalu, 2 March 1996). Everything I said there regarding the duties of counsel and of the trial judge; regarding when to object to the admission of evidence and regarding evidence not absolutely prohibited, is equally applicable here. Though everything I said there is pertinent, I need only repeat and say here that Mr Sugumar in not objecting to the admission of the two documents when they were tendered and in fact, in agreeing to their admission as the notes of proceedings show, cannot now be heard to say that the documents were not admissible. In any event, evidence was given by the witnesses that those documents were computer-generated and they were produced in the course of the ordinary use of the computer. There was no challenge to this evidence. Since there was this unchallenged

evidence, it becomes unnecessary to produce the certificate under s 90A(2) of the Evidence Act 1950 to prove that the documents were produced by a computer in the course of its ordinary use. It is only in the case where it is disputed, during the time the evidence was adduced, as to whether the documents were produced by a computer in the course of its ordinary use — which is not in issue here — would such a certificate then become necessary. This means the plaintiffs have produced some specie of evidence sufficient to establish a prima facie case that the defendant owes the plaintiffs the sum of RM168,575.43. Ms Wong had submitted that the defendant should not be heard to argue that the amount claimed is not correct because this was not raised in the pleading at all. I would rather deal with the defence to see whether, in view of the evidence of the defence, the plaintiffs have failed to prove their case. As regards the evidence of the defendant as to the amount he had repaid and as tending to show the amount claimed by the plaintiffs is not correct, this is how his evidence sounded like:

Examination-in-Chief

I am 51 years old, residing at 106, Jalan OKK Awang Besar, Labuan. I am a businessman. In 1981, I was granted a housing loan by the plaintiffs. It was a secured loan. I executed a charge in respect of the loan on 26 December 1981 Registered 11 May 1982. Drawdown effected at end of May 1982. I made repayments. Monthly RM3,600 plus. It is RM3,670. [*Witness shown P2*] Loan repayment was made one month later, sometime in July 1982. I have made about 50 instalment payment. Default was in August 1986. Until then paying regularly. Total repayment RM183,000 plus. Loan was released on 6 August 1981. [*Witness corrected himself*] No loan released on 6 August 1981. I did not commence repayment on 6 August 1981. [*Witness shown P21*]. Repayment only started in May 1982. P21 not correct.

Q: Upon default, did you receive P3?

A: Yes. This was the first foreclosure taken by the bank for the housing loan. After default, I made further payment P9, I paid the RM5,000 stated there. Apart from this, two months later I did make some payment. After foreclosure proceedings commenced, I did try to find buyers for property. I communicated this to the bank by P7, P8 and P9.

...

P21, RM372,422.15 at 25 June 1991. I do not think it is correct.

Q: Is it correct?

A: It is not correct.

Q: P22, RM168,575.42, after the sale of the property did you owe the bank this much?

A: No. I do not owe the bank this sum at all.

Under cross-examination

Q: These 50 instalments, were they for continuous 50 months?

A: More or less. I was not in default. Made quite regularly. No receipts for such payments.

In re-examination

Q: What happened to the receipts for repayment?

A: I have the receipt for the deposit of the money into the bank. It is in the company's file. The bank deducted every month for the account upon standing instruction.

Given the tentative nature of the evidence of the defendant, I do not think it was necessary to cross-examine him to show disagreement. The improbability of his evidence is inherent because he contradicted himself with almost every other sentence he uttered. He said that the loan was drawndown in May 1982 and that the repayment started one month later and yet in the very next breath he said the repayment started in July 1982. If the repayment was one month later after the drawdown, it should be in June and not in July. A few sentences afterwards, the defendant said the repayment started in May 1982. When asked how much was the monthly repayment, he was only able to say it was RM3,600 plus and it was only after he was shown the loan agreement that he said it was RM3,670, the figure stated in the loan agreement. As to the number of instalments he had paid, he said it was about 50 which means he could not be sure it was 50. When asked how much he had repaid, he was only able to say RM183,000 plus. The defendant said he had been making repayment regularly until he stopped in August 1986. If we are to take May 1982 as the month he started repayment, it means from May 1982 to July 1986, he had repaid 51 instalments. If we take the case of the repayment having started in June 1982, it would mean 50 instalments repayment and in the case of the repayment having started in July 1982, it would mean 49 instalments. Even without taking into account the fact that there is no document — when there should be according to his own evidence — we are left in doubt as to what really his case is. This can hardly be an answer to the plaintiffs' evidence as to the amount due or as to throw any doubt on those evidence. Another significant feature in this regard is that the defendant had never once disputed the amount owing (though he said RM220,000 was in full satisfaction of his debt), not till his evidence in court. I see no reason to disbelieve the witnesses of the plaintiffs who testified that the two documents (P21 and P22), among others, would in the normal course of events be despatched to the defendant, and despite his protestation, I am inclined to believe that the defendant had received them since he confessed to having received other documents sent by the plaintiffs to the same address. There was also no protest from the defendant to two letters of the plaintiffs, dated respectively 10 September 1991 and 26 October 1991, which set out the amount due from the defendant, which letters I am also of the view that the defendant had received since it was correctly addressed and the defendant's denial of receipt is not in the least convincing. His very indifferent attitude and sometimes casual manner displayed when giving his testimony betrays his disregard for the truth in this matter. When put to him that he had received the letter dated 19 November 1991 (P14), he denied it despite the fact that he had, in his own letter dated 30 November 1991, acknowledged receipt of it and despite having earlier on said he had received it when under examination-in-chief;

that is a display of disregard for the oath he had taken to tell the truth. In order to dispute the amount owing to the plaintiffs, he started off by saying: 'I do not think it is correct'. When pressed further by his counsel, he then said the figure was not correct. I, therefore, cannot accept his evidence that he had not received the said documents. Having received those documents which showed the amount he owed to the plaintiffs — which the plaintiffs are now claiming — and yet did not remonstrate, I am inclined to believe that there was really no dispute as to the amount owing aside from the evidence produced by the plaintiffs.

Conclusion

In the premises, judgment is ordered to be entered for the plaintiffs against the defendant for the sum of RM168,575.43 with agreed interest at 12% per annum from 28 December 1991 until full payment and costs to be taxed.

Order accordingly.

Reported by Tey Tsun Hang